Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CLARA M. BROWN,

Petitioner,

v.

TOKIO MARINE AND FIRE INSURANCE CO., LTD. and TOYOTA MOTOR SALES U.S.A., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Through the Judicial Improvements and Access to Justice Act of 1988, Congress sought to limit the availability of removal jurisdiction, particularly in situations in which a case had been pending for a substantial period in state court.

Congress amended § 1446(b) in 1988 to include the one-year limitation in order to "reduc[e] the opportunity for removal after substantial progress has been made in state court." H.R. Rep. No. 100-889, p. 72, 1988 U.S. Code Cong. & Admin. News, pp. 5982, 6032. This court recognized the change and the congressional intent behind the amendment in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996).

The decision of the Eighth Circuit below, as well as decisions of the Ninth and Fifth Circuits (which are contrary to numerous district court decisions nationwide), have created a body of case authority that contravenes the stated congressional intent, the specific language of the statute, and this Court's decision in *Caterpillar, Inc.*

The question presented is whether the one-year limitation contained in § 1446(b) applies to all cases in which removal jurisdiction is based upon 28 U.S.C. § 1332 or just those cases which were *not* originally removable.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

On March 25, 2002, the Eight Circuit Court of Appeals issued an opinion holding that the one-year limitation period set forth by 28 U.S.C. § 1446(b) *only* applied to cases which were *not* originally removable. For those cases which were originally removable, the one-year limitation did not apply.

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) as the instant appeal is taken from an opinion entered by the United States Courts of Appeals for the Eighth Circuit, said judgment having been entered on March 25, 2002. (Appendix A)

STATUTORY PROVISIONS INVOLVED

The instant writ involves questions surrounding the interpretation of 28 U.S.C. 1446(b) as that statute relates to a one-year limitation on removal in cases based upon diversity jurisdiction. Specifically, Congress amended 28 U.S.C. § 1446(b) to provide:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the

> case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

STATEMENT OF THE CASE

On May 22, 1998, Clara M. Brown filed actions for breach of contract and vexatious refusal to pay insurance proceeds against respondents in Missouri state court. The actions surrounded a dispute over the interpretation of an insurance policy and related lease agreement. The action was removed three times by respondents Toyota Motor Sales and Tokio Marine, and remanded twice by the district court.

Respondent Tokio Marine first sought to remove the case on August 20, 1998, and petitioner filed a petition for remand which was granted on October 16, 1998. (Appendix E) Respondent then sought relief in state court on venue issues, including a writ of prohibition filed in the Missouri Western District Court of Appeals. After the case was returned to the trial court on May 4, 1999, petitioner Brown sought leave to amend her petition and add respondent Toyota Motor Sales as a defendant. Based upon that motion alone, respondent Tokio Marine again sought to remove the case on April 6, 1999, even before Toyota Motor Sales had been added as a party or served. The district court again remanded the case to state court, finding the removal premature since Toyota Motor Sales had not yet been added to the case. (Appendix D)

Toyota Motor Sales was eventually served on September 21, 1999, some sixteen months after the case had originally been filed in state court. Respondents filed a notice of removal within thirty (30) days thereafter. Petitioner sought to have the

case remanded based upon the one-year limitation found in 28 U.S.C. § 1446(b) and this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 437, 136 L. Ed. 2d 43 (1996). The court denied the remand petition, holding that "Because this action was initially removable, the one-year limitation in 28 U.S.C. § 1446(b) does not apply, and Toyota Motor Sales' removal was timely." (Appendix C)

Subsequent thereto, respondents moved for summary judgment, asserting that the insurance policy and lease agreement were unambiguous and failed to provide the disputed coverage amounts.

On March 12, 2001, the district court granted summary judgment in respondents' favor (Appendix B), and petitioner Clara M. Brown appealed to the United States Court of Appeals for the Eight Circuit contesting the propriety of the district court retaining jurisdiction in a manner inconsistent with 28 U.S.C. § 1446(b). The court of appeals affirmed the district court's decision and found that the removal was not barred by the one-year limitation set forth in 28 U.S.C. § 1446(b), and this Court's decision in *Caterpillar*, because the case *was* originally removable. (Appendix A)

REASONS FOR GRANTING THE WRIT

Petitioner's writ should be granted for two reasons. *First*, the Eighth Circuit decision below, as well as decisions by the Ninth and Fifth Circuits Courts of Appeal, are in direct conflict with this Court's prior decision in *Caterpillar* and with a number of district court decisions. *Second*, the decision of the Eight Circuit below, as well as the decisions of the Ninth and Fifth Circuits, directly conflict with the express language of 28 U.S.C. § 1446(b), which states that a case

may not be removed on the basis of jurisdiction conferred by § 1332 of this title more than one year after the commencement of the action. That statutory language appears without limitation and clearly applies to removal of all diversity-based cases. To allow the circuit decisions below to stand without intervention and clarification by this Court will serve to expand rather than limit removal jurisdiction, directly in conflict with the stated purpose of the Judicial Improvements and Access to Justice Act of 1988.

I. The District Court lacked jurisdiction in that the cause was removed by Respondents more than one year after its commencement in state court and, therefore, removal was improper pursuant to 28 U.S.C. § 1446(b).

A federal court of appeals has a duty to inquire into the basis of its jurisdiction and of the jurisdiction of the district court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, __, 117 S. Ct. 1055, 1071, 137 L. Ed. 2d 170 (1997). "[I]f the record discloses that the lower court was without jurisdiction [a federal appellate court] will notice the defect, although the parties make no contention concerning it." *Id.* at __, 117 S. Ct. at 1071-72 (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986)). The removal of the instant cause was defective in that more than one year had elapsed since the original filing of petitioner Brown's Petition for Damages and, pursuant to 28 U.S.C. § 1446(b), the removal was untimely.

Removal statutes are to be construed narrowly. *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1349, 137 L. Ed. 2d 506 (1997); *Tech Hills II v. Phoenix Home Life. Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993).

The essential issue before the Court is whether the one-year limitation set forth in 28 U.S.C. § 1446(b) applies to all diversity cases or just to cases "not initially removable."

This Court has addressed the issue in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), stating, "No case, however, may be removed from state to federal court based on diversity of citizenship more than 1 year after commencement of the action." *Id.* at 473.

However, federal district courts and circuit courts, including the decision of the Eighth Circuit below, are split on whether the one-year prohibition applies to all cases in which jurisdiction is based upon diversity or only to cases not originally removable. The following authorities support of the interpretation expressed by this Court in *Caterpillar* that all diversity-based cases are subject to the one-year limitation: *O'Brien v. Powerforce, Inc.*, 939 F. Supp. 774, 778 & nn.1, 2 (D. Haw. 1996); *Kinabrew v. Emco-Wheaton, Inc.*, 936 F. Supp. 351, 353 (M.D. La. 1996); *Beisel v. Aid Ass'n for Lutherans*, 843 F. Supp. 616, 618-19 (C.D. Cal. 1994); *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1086-87 n.6 (S.D. W. Va. 1993); *Perez v. General Packer, Inc.*, 790 F. Supp. 1464, 1468 (C.D. Cal. 1992); *Hom v. Service Merchandise Co., Inc.*, 727 F. Supp. 1343, 1345 (N.D. Cal. 1990); *Rezendes v. Dow Corning Corp.*, 717 F. Supp. 1435, 1437-38 (E.D. Cal. 1989).

The contrary view has been expressed as dispositive in *Brown v. Tokio Marine and Fire Ins. Co.*, 284 F.3d 871 (8th Cir. 2002); *Johnson v. Heublein, Inc.*, 227 F.3d 236 (5th Cir. 2000); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001); *Badon v. RJR Nabisco, Inc.*, F.3d 382 (5th Cir. 2000); *Brierly v. Alusuisse Flexible Packaging, Inc.*,

184 F.3d 527 (6th Cir. 1999); *Ritchey v. UpJohn*, 139 F.3d 1313 (9th Cir. 1998); and *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 886 (5th Cir. 1998). Thus, not only does a conflict exist which this Court needs to address, but there is appellate court case law in direct conflict with a prior decision of this Court.

II. The plain reading of 28 U.S.C. § 1446(b) and the legislative intent support the one-year limitation for all cases based upon diversity jurisdiction.

The language of § 1446 is unambiguous; it plainly prohibits removal on diversity grounds of a case that was commenced in state court more than a year prior to its removal. 28 U.S.C. § 1446(b) states in pertinent part:

> If the case stated by the initial pleadings is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, ***except that a case may not be removed on the basis of jurisdiction conferred by Section 1332 of this Title more than one year after commencement of the action.***

Furthermore, the statute's legislative history, as well as common sense interpretation, supports the limitations application to all diversity cases. The one-year limitation was added to § 1446(b) as part of the Judicial Improvements and Access to Justice Act of 1988. Specifically, the one-year limitation was added as a means of reducing the opportunity for the removal of diversity cases after substantial progress

toward their resolution has been made in state court. A. Miller and E. Cooper, *Federal Practice and Procedure*, § 3732. Clearly, such a policy concern would be equally applicable to all diversity cases. Put another way, if Congress was concerned with disruption of state proceedings in cases which were not originally removable, why would the policy or concern be any different for cases "originally removable." Obviously, the intent would not be different!

Rather than turn congressional intent on its head, it would seem more logical, as this Court appeared to do in its *Caterpillar* decision, to assume that Congress would have expected cases that were originally removable would not be at issue because they would have either been removed by the original defendant or the right to remove would have been waived.

It is also interesting to note in considering the issue that courts have gone so far as to find the one-year period jurisdictional (and thus not subject to waiver, as is the case with the 30-day time period set forth in § 1446). *See Brock v. Syntex Labs, Inc.*, 791 F. Supp. 721 (D.C. Tenn. 1992) and *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081 (D.C. W. Va. 1993) (construing one-year diversity cap as a jurisdictional and not procedural defect). Furthermore, courts have also interpreted the statute's one-year limitation literally, even in the face of what may appear to be inequitable results based upon a plaintiff's conduct. *See Russaw v. Voyager Life Ins. Co.*, 921 F. Supp. 723 (D.C. Ala. 1996).

Obviously, Congress assumed that, if the case was removable originally, it would be removed within thirty days or the right to remove waived. As to cases not removable, Congress stated that they could be removed when they become removable. However, the statute reiterated that *no* case could be removed based upon diversity after one year.

The statute and this Court's decision in *Caterpillar* made no exception to that one-year limitation. Unfortunately, the appellate courts below have chosen not to follow such a clear mandate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED MARCH 25, 2002

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-1939

Clara M. Brown,

Appellant,

v.

Tokio Marine and Fire Insurance Co., Ltd.;
Toyota Motor Sales U.S.A., Inc.,

Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 15, 2001

Filed: March 25, 2002

Before BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and NANGLE,[1] District Judge.

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1. The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

Appendix A

BOWMAN, Circuit Judge.

In September 1994, Clara Brown was involved in an automobile accident with an underinsured motorist while on her way to a computer class required by her employer, Toyota Motor Sales. At the time of the accident, Brown was driving a car leased to her by Toyota. Toyota obtained insurance for the leased car through Tokio Marine and Fire Insurance Co. Brown sued Tokio in Missouri state court, seeking underinsured motorist benefits under Toyota's policy with Tokio to "partially satisfy a default judgment she obtained ... against the other driver involved in the accident." Appellee's Br. at 16. Although diversity jurisdiction existed between Tokio and Brown at the time Brown filed her complaint, *see* 28 U.S.C. § 1332 (1994 & Supp. IV 1998), Tokio attempted but failed to properly remove the case to federal court. Ninth months later Brown added Toyota as a defendant, bringing a breach of contract claim against Toyota for failure to maintain the underinsured motorist coverage that Brown argues her lease agreement with Toyota requires. Toyota, also a diverse party, removed the case to the District Court[2] with Tokio's consent. The District Court then granted summary judgment in favor of Tokio and Toyota, concluding that the provisions of Tokio's insurance policy and Toyota's lease agreement with Brown excluded the coverage she was seeking. Brown appeals and we affirm.

We must in the first instance ascertain whether this case is properly heard in federal court. Brown argues that this Court and the District Court are without subject matter

2. The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

jurisdiction because her case was removed from state court more than one year after its commencement, in violation of the one-year limitation period set out in the removal statute, 28 U.S.C. § 1446(b) (1994). The District Court addressed this argument and concluded that the one-year limitation period does not apply to cases such as Brown's suit that were removable to federal court when originally filed.

Brown's argument on this point raises an issue as yet undecided by this Circuit, as we have not construed the scope of the one-year limitations period in § 1446(b).[3] The text of the statute provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

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3. Our review of the case law discovered only one other case in this Circuit that has referred to the scope of the one-year limitations period of § 1446(b). To the extent that Brown construes our discussion in footnote four of *In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 476 (8th Cir. 1995), to support her argument, we conclude that it does not govern our decision for two reasons. First, the footnote is dicta and not controlling here. Second, the cause of action at issue in that case was not initially removable to federal court when filed; the case only became removable once non-diverse plaintiffs had been dismissed.

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b). Thus, the real question in this case is whether the last clause of the second paragraph of § 1446(b) modifies only the second paragraph, or applies more broadly to both paragraphs of the provision.

Three other circuits have addressed this question, and all three are in agreement with the position taken by the District Court and by Tokio and Toyota that rules of usage and statutory construction lead inevitably to the conclusion that the one-year limitation period modifies only the second paragraph of § 1446(b), and therefore only applies to cases that were not removable to federal court when originally filed. We are persuaded by the reasoning of those cases and we hold that construction to be the proper interpretation of the statute. *See Johnson v. Heublein Inc.*, 227 F.3d 236, 241 (5th Cir. 2000); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873,

886 (5th Cir. 1998); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316-17 (9th Cir.), *cert. denied*, 525 U.S. 963 (1998).[4]

Having determined that the one-year limitations period does not apply to Brown's case because complete diversity existed between Brown and Tokio when Brown filed her original complaint in state court in May 1998, it remains to inquire whether Toyota complied with the provisions of the first paragraph of § 1446(b). Brown moved to add Toyota as a defendant in March 1999, but Toyota was not served with the amended complaint until September 1999. Toyota filed a notice of removal within thirty days of the September service, a fact that Brown does not contest.

The law is settled in this Circuit that the thirty-day period to file a notice of removal runs from the time that a defendant is served with the complaint, even when the defendant is a later-served defendant and does not receive service until the time limit during which the first-served defendant could have removed the case has expired. *See Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756-57 (8th Cir. 2001). Toyota did not receive service of process until September 1999, and thus its subsequent notice of removal, filed within thirty days (and with Tokio's consent), was timely. We conclude that federal removal jurisdiction of Brown's claims is proper.

Turning to the merits of Brown's appeal, Brown argues that she is entitled to underinsured motorist coverage under

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4. Although we recognize that numerous district courts, cited by Brown, agree with the reading of the statute that she urges, we conclude that the construction adopted by the Fifth, Sixth, and Ninth Circuits represents the better-reasoned interpretation of the statute's language.

the policy issued by Tokio, and that her lease agreement with Toyota required Toyota to obtain underinsured motorist coverage for the accident. She argues that the District Court improperly granted summary judgment because the court misinterpreted the insurance policy's coverage provisions and the lease agreement with Toyota. Brown urges this Court to reverse the District Court and to grant summary judgment in her favor.

Under Missouri law, interpretation of the language in an insurance policy or a lease is a question of law, which we review de novo. *See St. Paul Fire & Marine Ins. Co. v. Mo. United Sch. Ins. Council*, 98 F.3d 343, 345 (8th Cir. 1996). After carefully reviewing the submissions of the parties and the applicable law, we conclude that summary judgment was properly granted in favor of Tokio and Toyota. We affirm based on the well-reasoned opinion of the District Court. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED MARCH 12, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Case No. 99-1014-CV-W-6

CLARA M. BROWN,

Plaintiff,

v.

THE TOKIO MARINE AND FIRE INSURANCE CO., LTD., *et al.*,

Defendants.

ORDER

Before the court is defendants' motion for summary judgment. The parties agree that there is no genuine dispute of material fact, and that summary judgment is therefore proper.

Factual and Procedural Background

Plaintiff Clara M. Brown was seriously injured in an automobile accident in Platte County, Missouri, on September 23, 1994. The plaintiff, who was an employee of Toyota

Motor Sales at the time of the accident, was driving her company issued (leased) automobile, and was en route to an employer-required computer training course. The plaintiff collected worker's compensation benefits for her injury. She also settled a case against the rental car company that owned the car that hit her, and obtained a $1 million default judgment against the negligent driver in state court. The plaintiff brought this declaratory judgment action against defendant Tokio Marine and Fire Insurance Co., Ltd. ("Tokio Marine"), claiming that her injuries were covered under Toyota's "underinsured motorist" or "UIM" policy provisions. In the alternative, she alleges breach of contract against defendant Toyota, on the ground that her lease agreement with Toyota required it to provide such UIM coverage.

Defendants move for summary judgment, claiming that, because the plaintiff was on company business at the time of the accident, neither the UIM policy provisions nor the agreement to provide UIM coverage apply. They cite to the terms of the policy and the lease agreement, and argue that both of these documents specifically exclude company-business incidents, as these incidents are fully covered by worker's compensation.

Standard for Summary Judgment

The question before the court is whether the record, when viewed in the light most favorable to the nonmoving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c). The moving

party bears the initial burden of identifying "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Federal Rule of Civil Procedure 56(c)). Once the moving party has met this burden, the non-moving party cannot simply rest on mere denials or the allegations in the pleadings; rather, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e). Although the court views the facts in a light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-moving party cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit. *See, e.g., Ghane v. West*, 148 F.3d 979, 981 (8th Cir. 1998); *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328,1331 (8th Cir. 1996).

The Tokio Marine Policy

Defendant Tokio Marine moves for summary judgment in its favor, claiming that the insurance policy it issued defendant Toyota, covering the plaintiff's leased car, did not cover the injuries she sustained in her accident. Interpretation of an insurance policy is a matter of law properly decided by the court. *Hobbs v. Farm Bureau Town & Country Ins. Co. of Missouri*, 965 S.W.2d 194,196 (Mo. Ct. App. 1998). Where an insurance policy is unambiguous, the policy will be enforced as written. *American Family Mut. Ins. Co. v. Ward*, 789 S.W.2d 791, 795 (Mo. 1990). Where there is "duplicity,

indistinctness or uncertainty" in the meaning of words used in a policy, then an ambiguity exists. *Nixon v. Life Investors Ins. Co.*, 675 S.W.2d 676, 679 (Mo. Ct. App. 1984). Where ambiguity in a policy lies, the policy will be construed against the insurer. *Behr v. Blue Cross Hosp. Svc., Inc.*, 715 S.W.2d 251, 256 (Mo. 1986). This is because, under Missouri's policy, insurance is designed "to furnish, not defeat, protection to the insured, and the insurance company is in the best position to remove ambiguity from a contract." *Krenski v. Aubuchon*, 841 S.W.2d 721, 730 (Mo. Ct. App. 1992). A court will not create an ambiguity, however, "in order to distort the language of an unambiguous policy, or . . . to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. General Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. 1991).

The Tokio Marine policy form, identified by affidavit (Exh. 10), shows that one automobile insured by defendant Toyota has uninsured motorist coverage. In the space for uninsured motorist coverage limit, the form refers the reader to the "UNINSURED/UNDERINSURED MOTORIST COVERAGE INFORMATION PAGE AND ENDT. NO. 5." The line for underinsured motorist coverage is blank. Endorsement No. 5 (page TMF 00714-Exh. 10) states:

> IT IS AGREED THAT THE UNINSURED/ UNDERINSURED LIMITS OF INSURANCE ARE THE STATUTORY LIMITS REQUIRED BY EACH STATE AS SHOWN ON THE UNINSURED/UNDERINSURED MOTORIST COVERAGE INFORMATION PAGE TO THIS POLICY.

* * *

Appendix B

IT IS ALSO AGREED THAT THE UNINSURED/ UNDERINSURED LIMITS OF INSURANCE AS SHOWN ON UNINSURED/UNDERINSURED MOTORIST COVERAGE INFORMATION PAGE ATTACHED TO THIS POLICY ARE AMENDED TO READ AS FOLLOWS:

$500,000 ANY ONE ACCIDENT OR LOSS BUT ONLY AS RESPECTS EMPLOYEES OF THE NAMED INSURED AND THEIR FAMILY MEMBERS AND ONLY IF THE EMPLOYEE OR FAMILY MEMBER IS NOT ON COMPANY BUSINESS AT THE TIME THEY ARE INVOLVED IN AN ACCIDENT WITH AN UNINSURED OR UNDERINSURED MOTOR VEHICLE.

The "UNINSURED/UNDERINSURED MOTORIST COVERAGE INFORMATION PAGE" (page TMF 00719-Exh. 10) then lists required minimum statutory coverage of uninsured and underinsured motorist coverage by state. Missouri's entry reads: "UM at 25/50 BI Limits" with offers "UM up to Policy BIL Limits." "UM" refers to uninsured motorist coverage as defined by the law of the state where the insured motor vehicle is registered, licensed, or principally garaged. "BI" and "BIL" are bodily injury and body injury liability, respectively. Although the coverage information page clearly lists "UIM" or underinsured motorist coverage for several states, there is no such coverage listed for many others, including Missouri. Defendants argue that the absence of "UIM" coverage minimums for Missouri on the information form indicate that Missouri requires no such coverage, and that UIM coverage is, therefore, not provided as part of the "statutory minimum" amount.

Most significantly, defendants argue, since the plaintiff was admittedly on company business at the time of her accident, she was clearly not covered under the policy's $500,000 limit for uninsured or underinsured motorists. This would leave her with only the statutory minimum amount of underinsured motorist coverage, which, in Missouri, is zero.

The court agrees with the defendants that the Tokio Marine policy unambiguously fails to provide for $500,000 underinsured motorist coverage unless the driver is a Toyota employee (or an employee's family member) who is *not* on company business at the time of the accident. Since the plaintiff was admittedly on Toyota business at the time of her accident, the statutory uninsured/underinsured motorist coverage clearly applies to her. While the uninsured/underinsured motorist information page could be confusing as to underinsured motorist coverage if only Missouri were listed, it appears clear, when viewing the document as a whole, that some states require underinsured motorist coverage, and therefore that the policy provides such coverage in those states, and that other states, including Missouri, do not require such coverage, and that the policy thus does not provide it. Accordingly, summary judgment in favor of defendant Tokio Marine will be granted.

Toyota Lease

The plaintiff's complaint alleges that, if the Tokio Marine policy failed to cover her injury, then defendant Toyota breached its lease agreement with her, because the lease promises to provide uninsured/underinsured motorist

coverage in the amount of $500,000. Defendant Toyota moves for summary judgment, claiming that the lease, in language similar to that used in the insurance policy, creates an exception for accidents occurring while the employee is on company business. The Toyota "ASSOCIATE MOTOR VEHICLE LEASE" (Exh. 5) reads on page 2, in part:

> LESSOR shall provide the following insurance:
>
> 3. Uninsured and Underinsured Motorist — $500,000 limit of liability for LESSEE and family; statutory uninsured and underinsured motorist for all others and for associates driving lease vehicle while on company business.

The plaintiff claims that the lease agreement's use of the term "associate" instead of "lessee" in the above language indicates that the company business exclusion is intended only to apply to associates (employees) other than the lessee. This construction would make the entire phrase "and for associates driving lease vehicle while on company business" redundant, as this group of people would be included in the phrase "all others." Moreover, the lease obviously considers "lessee" and "associate" to be the same person, since the agreement is called "ASSOCIATE MOTOR VEHICLE LEASE."

The plaintiff argues that the above paragraph's use of a semicolon after the word family means that the limiting language following the semicolon cannot modify the language before the semicolon. There are several problems

with the plaintiff's argument. First, the language the plaintiff offers which she feels would more clearly limit Toyota's coverage obligation in the manner defendants urge suffers from the same semicolon problem. Second, that the plaintiff could conceivably have punctuated or written the contract more clearly does not create ambiguity where none otherwise exists. To a careful reader the meaning is clear.*

Finally, the plaintiff argues that the paragraph defining "eligible drivers" could include Toyota employees other than the plaintiff, the term "associate" must mean associates other than the lessee. Again, this construction would make the clause containing the term "associates" unnecessary, since this group of people is included in the phrase "all others."

The Toyota lease, like the Tokio Marine policy, clearly offers (or promises) insurance coverage for Toyota employee lessees and their family members in the amount of $500,000 *unless the accident occurs while the employee is on company business*. Because the plaintiff's accident admittedly occurred while she was on company business, the policy does not cover her injuries, and the lease agreement was not breached. Moreover, the court's enforcement of the policy and the lease agreement as they are written does not create any injustice. The plaintiff collected worker's compensation benefits for her injuries, which is clearly what the policy and the lease agreement contemplate. While the plaintiff may wish that the policy and lease agreement would allow her to collect a

---

* Ambiguity is not created by any confusion, mishandling or possible admissions by defendants' personnel and plaintiff cites no law favoring her on this point when the meaning is, in my view, quite clear.

greater sum, that they do not does not render them unfair or unenforceable.

For the above-stated reasons, it is hereby

ORDERED that the defendants' motion for summary judgment (ECF doc. 18) is GRANTED. The Clerk is directed to enter judgment for defendants.

March 12, 2001

Kansas City, Missouri

/s/ Howard F. Sachs
HOWARD F. SACHS
United States District Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED MAY 1, 2000

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 98-0910-CV-W-6

CLARA M. BROWN,

Plaintiff,

v.

THE TOKIO MARINE AND
FIRE INSURANCE CO., LTD., and
TOYOTA MOTOR SALES, U.S.A., INC.,

Defendants.

No. 99-0342-CV-W-6

CLARA M. BROWN,

Plaintiff,

v.

THE TOKIO MARINE AND
FIRE INSURANCE CO., LTD., and
TOYOTA MOTOR SALES, U.S.A., INC.,

Defendants.

Appendix C

No. 98-1014-CV-W-6-ECF

CLARA M. BROWN,

Plaintiff,

v.

THE TOKIO MARINE AND
FIRE INSURANCE CO., LTD., and
TOYOTA MOTOR SALES, U.S.A., INC.,

Defendants.

ORDER

This case is before the *court* for a third time. It has been twice remanded to the state court, and plaintiff now moves the court a third time to remand the case. The plaintiff filed her motion to remand under both of the previous case numbers. Her filing was incorrect and the motion should have been filed under case No. 99-1014-CV-W-6-ECF. Because of the plaintiff's filing error, the defendants were unable to electronically file their suggestions in opposition to the motion for remand. The defendants did provide the court with a copy of the suggestions they attempted to file, and they served the plaintiff with their suggestions. The plaintiff failed to reply. The court now addresses this third motion to remand.

On May 22, 1998, plaintiff Clara M. Brown commenced an action solely against Tokio Marine in the Circuit Court of Jackson County at Kansas City for the recovery of damages.

Appendix C

Tokia Marine sought removal of the plaintiff's original petition, which was denied by this court on the grounds that Tokio Marine had received the original petition more than thirty days prior to the date of its removal notice, though the notice of removal had been filed within thirty days of service of the original petition on Tokio Marine. The case, as originally filed, was removable on the basis of diversity.

On March 4, 1999, plaintiff served local counsel for Tokio Marine, also local counsel for Toyota, with a motion to amend the petition adding Toyota as a defendant. Relying upon this court's previous remand order, Toyota filed a notice of removal on April 6, 1999, before it was served. This court again remanded the case, finding that the removal was premature pursuant to the United States Supreme Court's recent decision in *Murphy Brothers. Inc. v. Michetti Pipe StrinQing, Inc.*, 526 U.S. 344 (1999) . In its order, this court noted that "the cases cited by Toyota strongly support Toyota's eventual ability to remove the matter to this Court, with Tokio Marine's consent."

Toyota was served with plaintiff's amended petition for damages on September 21, 1999, and timely filed a notice of removal within thirty days of that service.

Plaintiff now contends that the action cannot be removed because removal is based upon diversity of the parties, and the action was filed over one year prior to Toyota's removal. The removal statute, 28 U.S.C. § 1446 (b), states (¶ 2):

Appendix C

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Plaintiffs claim that despite the initial language quoted, the one-year limitation applies to the removal of all diversity cases, not just those that were not initially removable. The overwhelming weight of the available authority is to the contrary. *See, Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999), *cert denied*, 120 S.Ct. 790; *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 886 (5th Cir. 1998); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998). Plaintiff finds support in language from a Supreme Court case, *Caterpillar. Inc. v. Lewis*, 519 U.S. 61, 69 (1996). In *Caterpillar*, the Court commented, "No case, however, may be removed from state to federal court based on diversity of citizenship 'more than 1 year after commencement of the action.' " Id. (*Quoting* 28 U.S.C. § 1446 (b)). The Supreme Court, however, faced a situation where the action was not initially removable, and thus did not address the circumstances present here. Both *Brierly* and *Ritchev*, cited above, acknowledge *Caterpillar* and distinguish it on this basis. Because this action was initially removable, the one-year limitation in 28 U.S.C. § 1446(b) does not apply, and Toyota's removal was timely. Accordingly, it is hereby

Appendix C

ORDERED that the clerk refile the plaintiff's motion to remand and suggestions in support, originally filed under case No. 98-0910-CV-W-6, on November 19, 1999 (docs. 20 and 21), under case No. 99-1014-CV-W-6-ECF. It is further

ORDERED that the clerk file the defendants' suggestions in opposition to the motion to remand, supplied to the court on December 10, 1999, under case No. 99-1014-CV-W-6-ECF. It is further

ORDERED that the clerk close case No. 98-0910-CV-W-6 and 99-0342-CV-W-6, if they have not been closed already. Any pending motions in those cases are hereby DENIED. Finally, it is

ORDERED that the plaintiff's motion to remand the pending action (99-1014-CV-W-6-ECF) is DENIED.

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: 5-1-oo __, 2000.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED MAY 19, 1999

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 99-0342-CV-W-6

CLARA M. BROWN,

Plaintiff,

v.

THE TOKIO MARINE AND
FIRE INSURANCE CO., LTD., and
TOYOTA MOTOR SALES, U.S.A., INC.,

Defendants.

ORDER

Before the court is plaintiff's second motion to remand this action to the state court. The first time this case was before this court, the court used the "receipt rule" for determining when the thirty-day removal period begins to run. Due to this choice of rule, defendant Tokio Marines s notice of removal was held untimely, and the case was remanded. Since that time, the United States Supreme Court has held that the "service rule" rather than the receipt rule should be used. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, No.97-1909, April 5, 1999. Under this rule, defendant Tokio Marines s first notice of removal would have been ruled timely.

Appendix D

After the remand, the plaintiff moved to amend her state-court petition to add defendant Toyota Motor Sales, U.S.A., Inc. ("Toyota"). The motion was unopposed, but before the state court Judge ruled on the motion, thirty days had expired since "defendant" Toyota had received its copy of the motion to amend. Because this court had implemented the " receipt rule," Toyota determined that it had to proceed with the filing of its notice of removal, even though it was not officially a party to the suit. Plaintiff again moves the court to remand the action.

Non-parties, such as Toyota, lack standing to effect removal. *See Housing Authority of the City of Atlanta v. Millwood*, 472 F.2d 268, 272 (5th Cir. 1973); *Adams v. Adminastar Defense Svc., Inc.*, 901 F.Supp. 78 (D. Conn. 1995); *Ortiz v. Centennial Life Ins. Co.*, 1994 WL 80902 (E.D. La. 1994). Accordingly, the plaintiff's motion to remand will be granted. Plaintiff's request for attorney fees and costs will be denied, however, as Toyota, upon filing its notice of removal, reasonably believed that it faced expiration of its removal period. It thus had to file its notice of removal or risk waiving its right to remove, even though it was not a party to the action. Since the Supreme Court's ruling in *Murphy Bros.*, it is now clear that once Toyota is properly served, and officially becomes a party, it will have an additional thirty days to remove the action once again to this court. Additionally, the cases cited by Toyota strongly support Toyota's eventual ability to remove the matter to this court, with Tokio Marine's consent. Accordingly, it is hereby

ORDERED that plaintiff's motion to remand this action is GRANTED. The clerk is directed to remand this case no earlier than June 1, 1999.

Appendix D

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: MAY 19, 1999.

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED OCTOBER 16, 1998

UNITED STATES DISTRICT COURT
W.D. MISSOURI

No. 98-0910-CV-W-6

CLARA M. BROWN,

Plaintiff,

v.

THE TOKIO MARINE AND FIRE INSURANCE CO., LTD.,

Defendants.

Oct. 16, 1998.

* * *

ORDER

SACHS, j.

This diversity civil action, in which plaintiff seeks damages pursuant to state law claims, is before the court on plaintiff's motion to remand, to which defendant has filed a response.

Plaintiff filed this action in the Circuit Court of Jackson County, Missouri, on May 22, 1998. On that same day, plaintiff's counsel sent via facsimile transmission and regular mail, correspondence including a "filed" stamped copy of the petition

for damages to Cheryl Slattery, the assistant supervisor of non-marine claims with Tokio Marine. The correspondence stated, "It is my sincere hope that it will not be necessary to proceed with litigation, however, if I have not heard from you within thirty (30) days with a meaningful offer to resolve this matter, we will move forward with taking steps to serve Tokio Marine and proceed with suit." Plaintiff heard back from defendant's counsel on June 18, 1998, but no settlement was reached. Therefore, on July 24, 1998, defendant was formally served with the summons and petition for damages through the Missouri Director of the Department of Insurance. On August 20, 1998, defendant filed its notice of removal with this court.

Plaintiff now moves to remand the action to the state court, claiming that defendant did not file its notice of removal within 30 days of receiving a copy of her petition as is required by the removal statute, 28 U.S.C. § 1446(b). Defendant contends that removal was timely, since it was within 30 days of formal service. 28 U.S.C. § 1446(b) states: The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

There is a split of authority as to whether the thirty day time period begins to run from the date defendant received its copy of the petition from plaintiff or whether it runs from the date defendant was served with the petition.

Appendix E

Although the Court of Appeals for the Eighth Circuit has not yet decided this issue, all other circuit courts have favored the former position, known as the "receipt rule." The receipt rule is supported by the following: 1) the straightforward interpretation of the clear and unambiguous removal statute naturally results in such a rule; 2) in light of the legislative history, the receipt rule is not "demonstrably at odds" with Congress' intent in amending § 1446(b); and 3) the rule is consistent with the long-standing policy that removal statutes should be construed strictly and against removal. *Brown v. Mayflower Transit, Inc.*, 960 F.Supp. 212, 214 (W.D.Mo. 1997); *Tech Hills II Assocs. V. Phoenix Home Life Mutual Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (citation omitted).

The courts choosing the "service rule" have relied mainly on the legislative history pertaining to the amendment of the removal statute. The removal statute formerly provided that the removal petition be filed in federal court "within twenty days after commencement of the action or service of process, whichever is later." 62 Stat. 9393 (1948). The phrase "through service or otherwise" was added to the removal statute with the intention of expanding the removal period in states like New York which permitted suit to be commenced by merely serving defendant with a summons. *Love v. State Farm Mutual Auto. Ins. Co.*, 542 F.Supp. 65, 68 (N.D.Ga. 1982). The courts following the service rule reason that "the amendments were not designed to permit a plaintiff to circumvent the personal service requirements through informal service." *Bullard v. American Airlines*, 929 F.Supp. 1284, 1286 (W.D.Mo. 1996).

Appendix E

The Western District of Missouri has had two opportunities to decide this issue and unfortunately those opportunities have yielded opposite results. In *Brown v. Mayflower Transit, Inc.*, 960 F.Supp. 212, 214 (W.D.Mo. 1997), Chief Judge Bartlett implemented the "receipt rule" in a factual situation very similar to the case at bar. Only the year before, Judge Gaitan had adopted the "service rule" for the reasons stated above. Despite the appeal of the service rule, the current weight of authority seems to be behind the plain-language argument and the receipt rule. Therefore, the receipt rule is the one this court will follow.

Since defendant received a copy of plaintiff's petition on May 22, 1998, its thirty days in which to remove began to run at that time. Defendant's notice of removal was not filed until August 20, long after the expiration of the thirty days. Therefore, it is

ORDERED that plaintiff's motion to remand due to defendant's untimely attempt at removal will be GRANTED. The Clerk is directed to remand this case no earlier than November 1, 1998.

1998 WL 724057, 1998 WL 724057 (W.D.Mo.)

(2)

No. 01-1868

Supreme Court, U.S.
FILED
JUL 30 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CLARA M. BROWN,

Petitioner,

v.

TOKIO MARINE AND FIRE INSURANCE CO., LTD. and TOYOTA MOTOR SALES U.S.A., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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1489

STATEMENT PURSUANT TO RULE 29.6

Respondents Tokio Marine and Fire Insurance Co., Ltd. and Toyota Motor Sales, U.S.A., Inc. state:

1. Respondent Toyota Motor Sales U.S.A., Inc. is wholly owned by Toyota Motor North America, Inc.; and

2. Respondent Tokio Marine and Fire Insurance Co., Ltd. is a Japanese corporation, does not have a parent company and no publicly held corporation owns 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

Without exception, every Circuit Court of Appeals presented with the issue has ruled that the one-year time limit for removal applies only where the "initial pleading is not removable," and does not apply to cases like this one that are removable when filed. This is because the plain language of 28 U.S.C.A. § 1446(b), establishing time limits for seeking removal, distinguishes between cases that are initially removable like this one and those that are not. *See, e.g., Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998) (holding that, by its express terms, one-year limitation in the second paragraph of § 1446(b) only applies where the "initial pleading is not removable").

Section 1446(b), by its express language, provides two alternative time limits in separate paragraphs. The first paragraph (which is controlling here) applies to cases that are removable when filed requiring removal within 30 days of service, with each defendant permitted a full 30 days to effect removal. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (30-day period under first paragraph of § 1446(b) begins upon formal service); *Marano Enterprises v. Z-Teca Resaurants, et al.*, 254 F.3d 753, 756-57 (8th Cir. 2001) (each defendant has its own 30-day period to effect removal, rejecting "first-served" rule). The second paragraph, which includes the one-year limitation, applies only to those cases that are not initially removable, but later "become removable":

> (b) The notice of removal of a civil action or a proceeding shall be filed within thirty days after the receipt by the defendant, through

> service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> **If a case stated by the initial pleading is not removable**, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of this action.

28 U.S.C. § 1446(b) (emphasis added).

Thus, even where the newly-added Toyota was not served until 16 months after the lawsuit was filed, its removal within 30 days of service (with the consent of Tokio Marine) was timely. It is notable that the original defendant, respondent Tokio Marine, sought removal at the outset but that removal was deemed untimely because the district court applied the "actual receipt" rule, now abrogated by this Court in *Murphy Bros., Inc., supra*. Had the district court applied the "service rule" dictated by *Murphy*, Tokio Marine's removal would have been successful. *See* Pet. App. C at p. 18a; and Pet.

App. D at p. 21a. In any event, the district court properly denied Petitioner's motion for remand following Toyota's removal at issue here, holding that the one-year rule did not apply.

Despite unanimity among the circuits, Petitioner seeks review on certiorari claiming that the 8th, 5th, 6th, and 9th Circuit's interpretation of § 1446(b) is in "direct conflict" with (1) this Court's prior decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996); (2) "a number of district court decisions"; and (3) the "express language" of § 1446(b). Not only are there no conflicts, but there are certainly no "compelling reasons" justifying review of this issue under S. Ct. Rule 10 either.[1]

I. THE 8th CIRCUIT'S JOINDER IN THE 5th, 6th AND 9th CIRCUITS' REJECTION OF THE ONE-YEAR RULE IN CASES THAT ARE INITIALLY REMOVABLE DOES NOT CONFLICT WITH *CATERPILLAR*.

Without further discussion or analysis, plaintiff relies on a single sentence quoted out of context from *Caterpillar* for the notion that the one-year rule applies to all diversity cases, rather than just to those that later become removable. Pet. at 5. But in *Caterpillar*, this Court was not dealing with the situation where the case was initially removable as here (governed by the first paragraph of § 1446(b)), nor was it attempting to define the scope of the one-year rule.

Instead, the *Caterpillar* court was called on to construe only the *second* paragraph of § 1446(b), containing the

1. Petitioner does not seek review of the insurance coverage or automobile lease questions resolved by the 8th Circuit in favor of respondents.

one-year limitation, because the case was "non-removable at the lawsuit's start." *Caterpillar*, 519 U.S. at 65. And, in particular, the question answered was whether the absence of complete diversity at the time of removal was fatal to jurisdiction if, at the time of trial, complete diversity existed. *Id.* at 64. Within one-year of suit being filed, Caterpillar removed the case from state court after a settlement was reached between plaintiff and a non-diverse defendant. *Id.* While the settlement between the plaintiff and the non-diverse defendant did not achieve complete diversity because of another pending subrogation claim against the non-diverse defendant, the district court nevertheless incorrectly denied plaintiff's motion for remand. *Id.* at 66-67. After further discovery, the subrogation claim was also settled, this time resulting in complete diversity, and the case proceeded to trial. *Id.* Despite the error in failing to remand earlier, this Court determined that because complete diversity existed at the time of trial, "wip[ing] out the adjudication postjudgment, and return[ing] to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77. Thus, this Court held that the absence of complete diversity at the time of removal "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar*, 519 U.S. at 64.

In this context, the Court discussed the one-year limitation in the second paragraph noting that had Caterpillar waited until the case was ripe for removal (i.e. when the subrogation claim was settled), the one-year limitation

"would have barred the way." *Id.* at 75.[2] This Court did not rule that the one-year limitation applied to removal effected under the first paragraph of § 1446(b).

Finally, it is significant to note that the district court in this case, as well as the 9th and 6th Circuits, acknowledge Caterpillar and distinguish it on this very basis. *See* Pet. App. C, at p. 19a; *Ritchey*, 139 F.3d at 1317, and *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 535 n.4 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 790 (2000). There is simply no direct conflict with *Caterpillar* justifying review on certiorari.

II. CONFLICT WITH "A NUMBER OF DISTRICT COURT DECISIONS" WHICH ARE NOW ABROGATED BY LATER CIRCUIT COURT OF APPEALS' OPINIONS IS NOT A BASIS FOR REVIEW.

Petitioner string-cites several district court cases in apparent conflict with the 8th Circuit's decision in this case. *See* Pet. at p. 5. First, conflict with a district court decision is not a legitimate basis for review on certiorari under S. Ct. Rule 10. Second, it is important to note that with one exception, these cases arise in the 5th and 9th Circuits, which have now rejected the contrary holding in those cases. *See, e.g., Ritchey, supra*, and *Johnson v. Hublein, Inc.*, 227 F.3d 236 (5th Cir. 2000). The sole exception is a district court case out of West Virginia,[3] within the 4th Circuit that has not yet spoken directly on this issue.

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2. Even though the one-year limit does not apply here, Tokio Marine's first attempt at removal was actually within one-year of suit being filed. This removal was deemed premature after the then-recent ruling in *Murphy Bros., supra. See* Pet. App. C at pp. 21a-22a.

3. *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1086-87 n.6 (S.D. W.Va. 1993).

As noted above, every Circuit Court of Appeals that has addressed the issue presented here has taken the same view as the 8th Circuit in this case. These decisions include the following: *Gibson v. Chryler Corp.*, 261 F.3d 927 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 903 (Jan. 14, 2002); *Ritchey, supra*; *Brierly, supra*; *Johnson, supra*; *Baden v. RJR Nabisco, Inc.*, 224 F.3d 382 (5th Cir. 2000); and *New York Life Ins. Co. v Deshotel*, 142 F.3d 873 (5th Cir. 1998).

III. THERE IS NO CONFLICT WITH THE EXPRESS LANGUAGE OF § 1446(B) BECAUSE THE ONE-YEAR LIMITATION QUITE CLEARLY MODIFIES ONLY THE *SECOND* PARAGRAPH, APPLYING ONLY TO CASES THAT ARE NOT REMOVABLE WHEN FILED.

First, it should be noted that Petitioner fails to cite the first paragraph of § 1446(b) in her brief. Read together, it is evident from the express language of the statute that there are two alternative time limits in two separate paragraphs. One applies to cases that are initially removable, and the other to those that are not. This is already discussed at the outset of this Opposition, and will not be repeated. Suffice it to say, that the 5th, 6th, 9th and 8th Circuits all agreed that rules of usage and statutory construction "lead inevitably" to the conclusion that the one-year time limit modifies the *second* paragraph. And, therefore, it only applies to cases that were not removable to federal court when originally filed. *See* Pet. App. A at p. 4a; and *Brierly*, 184 F.3d at 534-535 (the one-year limit "can only be interpreted to modify the antecedent clause to which it is attached, and not previous sections of the text. If Congress had intended to place a one-year limitation on removal of all diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose").

Finally, Petitioner argues that the 8th Circuit's construction of § 1446(b) would "turn congressional intent on its head." Pet. at p. 7. First, if the statute is clear and unambiguous as it is here, there is no need to turn to legislative history as a guide to its meaning. *Ritchey*, 139 F.3d at 1316-1317. Nevertheless, the legislative history supports the 8th Circuit's reading of § 1446(b). While it is true that Congress added the one-year limit to § 1446(b) in 1988 to "reduc[e] the opportunity for removal after substantial progress had been made in state court," Petitioner fails to state that the amendment was to address problems created by elimination of parties, e.g. by settlement with a diversity-destroying defendant on the eve of trial. H.R. Rep. No. 100-889, p. 72, 1988 U.S. Code Cong. & Admin. News pp. 5982, 6032 ("The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. . . . Removal late in the proceedings may result in substantial delay and disruption."). In other words, congressional intent appears to be concerned about cases that become removable late in the game, not cases that are subject to removal when originally filed. This is consistent with placement of the one-year limitation in the second paragraph of § 1446(b). *See also Ritchey*, 139 F.3d at 1316-1317 (containing discussion of legislative history); and *New York Life Ins.*, 142 F.3d at 886-997 (same).

Moreover, contrary to Petitioner's argument, this policy concern of avoiding substantial delay and disruption on the eve of trial is not "equally applicable" to all diversity cases (Pet. at p. 7). As here, the **addition** of a new party to a case that was originally removable after the litigation progresses is always conditioned on obtaining leave of court or the written consent of the parties under F.R.C.P. 15. Leave of court can be denied at the district court's discretion if

substantial delay and disruption would result, especially if plaintiff was dilatory in adding the new party or others would be unduly prejudiced. Once added, the existing parties nearly always expect delay to permit the newly added party to develop its defenses. Removal under those circumstances would not cause any more significant delay or disruption than is already caused by adding a new party to the litigation. In contrast, the elimination of a party on the eve of trial — the situation addressed by the one-year rule — especially if it is by settlement, should be encouraged. Eliminating the possibility of removal following a late settlement that creates diversity jurisdiction for the first time furthers the long-standing policy favoring settlements.

Thus, there is simply no compelling policy reason why the express language of the statute should be ignored and the one-year limitation applied to all diversity cases as Petitioner argues.

CONCLUSION

The 8th Circuit correctly determined — along with the 5th, 6th and 9th Circuits — that the one-year limitation on removal of diversity cases applies only to those cases that are not initially removable. This is because customary usage and rules of statutory interpretation lead inevitably to the conclusion that the one-year limit, contained in the second paragraph of § 1446(b), modifies the antecedent clause to which it is attached, and not the preceding paragraph. Quite simply, there is no disagreement among the Circuits on this issue, no conflict with this Court's decision in *Caterpillar*, no conflict with the express statutory language, and no other "compelling reason" justifying review on certiorari. For these reasons, Petitioner's request should be declined and the Petition for Certiorari denied.

Respectfully submitted,

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